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No. 94-1170

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ARTHUR JOHNSON, individually and on behalf of all persons similarly situated,
Petitioner,

v.

AMERICAN AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District

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BRIEF OF RESPONDENT AMERICAN AIRLINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether petitioner Arthur Johnson's state law claim challenging the rate an airline charged for refunding a reduced price ticket is preempted by the express preemption provision of the Airline Deregulation Act of 1978.

RULE 29.1 STATEMENT

Respondent American Airlines, Inc. is wholly owned by AMR Corporation, a Delaware corporation, and owns 49% of DFW Terminal Corp., a Texas corporation.

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BRIEF OF RESPONDENT AMERICAN AIRLINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

This case involves a breach of contract claim against respondent, American Airlines, Inc. ("American"). The claim indisputably "relates to" American's rates under the test for preemption established in *Morales v. Trans World Airlines, Inc.*, 112 S.Ct. 2031 (1992). And as pled by the petitioner, Arthur Johnson ("Johnson"), enforcement of this claim will necessarily require enforcement of state laws and policies that are external to any agreement American is alleged to have made, and thus involves "state laws" under the test established in *Wolens v. American Airlines, Inc.*, 157 Ill. 2d 466, 626 N.E.2d 205 (1993), *cert. granted*, 114 S.Ct. 1396 (1994), *aff'd in part, rev'd in part, and remanded*, 63 U.S.L.W. 4066

(Jan. 18, 1995). Accordingly, the claim is plainly preempted by section 1305(a)(1) of the Airline Deregulation Act of 1978 ("ADA"), § 41713(b)(1)(1994) (superseding 49 U.S.C. App. § 1305(a)(1)(1993))[1] and Johnson's petition for certiorari should be denied.

STATEMENT OF THE CASE

In his petition, Johnson challenges the method used by American to calculate the service charge assessed upon the refund of a reduced price airline ticket. He claims the method used by American to calculate the service charge resulted in his being overcharged $3.14.[2] Johnson purports to bring his claim on behalf of himself and all other persons similarly situated. JC. 2. However, the putative class has never been certified, and, for the reasons stated below, never will be certified.

Johnson alleges that he contacted American by telephone and purchased a reduced fare ticket for $158, comprised of $146.30 for air transportation and $11.70 for the federal transportation excise tax, 26 U.S.C. § 4261(a). JC. 118, 126. Johnson's ticket was subject to a 25 percent

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[1] In the current version of section 1305(a)(1) of the ADA, the language "relating to rates, routes, or services" is replaced by "related to a price, route, or service." This change occurred as part of a broad scheme to recodify certain provisions of Title 49 of the United States Code. Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745. The legislative history to this recodification statute reveals no intent to change the substance of the ADA preemption provision. *See* H.R. Rep. No. 180, 103d Cong., 2d Sess. (1994).

[2] Johnson erroneously states that the amount of alleged overcharge was $3.14. The actual difference between the method used by American to calculate the service charge and the method Johnson claims should have been used is $2.92. Johnson's error flows from his erroneous calculation that 25 percent of $146.30 equals $36.85. (It actually equals $36.58.) Johnson compounds his error by calculating the difference between $39.50 and $36.85 as $3.14. (It actually equals $2.65.) In any event, the amount in controversy is truly insignificant.

service charge for any refund or change in the reservation. JC. 118. Accordingly, when Johnson cancelled his reservation, American assessed a service charge of $39.50, representing 25 percent of the fare, and refunded $118.50 to Johnson. *Id.*

Johnson alleges that representatives of American orally advised him that the service charge for refunding a reduced fare ticket was 25 percent of the "fare." JC. 117, 478-479. Johnson claims American breached an alleged oral contract to assess the 25 percent service charge against the "fare," which he argues should not include the federal transportation excise tax. JC. 117-118.[3]

The trial court entered summary judgment in favor of American and against Johnson. On appeal, the Illinois Appellate Court for the First District affirmed the trial court's decision, holding that section 1305(a)(1) of the ADA preempted Johnson's lawsuit under *Morales*, 112 S.Ct. 2031. *Johnson v. American Airlines, Inc.*, 261 Ill. App. 3d 622, 633 N.E.2d 978 (1st Dist. 1994), *appeal denied*, 157 Ill. 2d 503, 642 N.E.2d 1282 (1994).

The appellate court limited its decision to whether, under *Morales*, Johnson's specific claim "related to" airline rates and thus fell within the scope of preemption under section 1305(a)(1) of the ADA. *Johnson*, 633

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[3] Third Amended Class Action Complaint For Accounting and Other Relief, filed June 6, 1988 at App. 1a-9a. Johnson's complaint alleged breach of oral contract (Count I) and that the service charge is an unenforceable penalty (Count II). Johnson abandoned Count II in the court below, however. *See* Plaintiff's Resp. to Mot. For Summ. J., p. 5 at JC. 466. ("This complaint, by its explicit terms, is a simple claim for breach of contract—nothing more, and nothing less.") In his Petition, Johnson states unequivocably that "[t]his is a case for breach of [an] airline ticket contract[]." Pet. at 3. In any event, Count II is preempted under section 1305(a)(1) of the ADA, *i.e.*, it both relates to airline rates and also requires the application of Illinois substantive law and normative policies. *See* Parts I and II of this brief.

N.E.2d at 980. The appellate court also acknowledged that this Court had granted certiorari in *Wolens*, 157 Ill. 2d 466, 626 N.E.2d 205 (1993), *cert. granted*, 114 S.Ct. 1396, *aff'd in part, rev'd in part, and remanded*, 63 U.S.L.W. 4066 (Jan. 18, 1995), and it expressly cautioned that its holding did *not* mean that *all* state law claims for breach of ticket contracts were preempted. *Johnson*, 633 N.E.2d at 980.

Johnson's claim that the appellate court's "unarticulated assumption" was that this Court would reverse the Illinois Supreme Court's decision in *Wolens* is therefore incorrect. To the contrary, the appellate court expressly found that *Wolens*, however it might be decided, would not be dispositive because under *Morales* American's airline refund policy is "more closely connected to rates" than are frequent flyer programs. *Johnson*, 633 N.E.2d at 980. The appellate court denied rehearing. Thereafter, Johnson sought leave to appeal to the Illinois Supreme Court, which was likewise denied. *Johnson*, 157 Ill. 2d 503, 642 N.E.2d 1282 (1994). Johnson then filed this petition for certiorari.

On January 18, 1995, this Court decided *Wolens*, reversing the Illinois Supreme Court's judgment to the extent it allowed survival of the plaintiffs' Consumer Fraud and Deceptive Business Practices Act claims, 815 ILCS 505/1 *et seq.* (1993), and affirming the judgment to the extent it allowed their breach of contract action to proceed. 63 U.S.L.W. at 4071. The opinion of the appellate court below is consistent with this Court's opinion in *Wolens*.

In *Wolens*, this Court held that certain contract claims remain preempted under the ADA. *Id.* at 4069-71. Similarly, the appellate court's decision in *Johnson* did not hold categorically that all contract claims are preempted. Johnson's contract claim in this case falls squarely within

the range of preemption recognized in *Wolens* and *Morales*. Johnson's breach of contract claim is also identical to the claims deemed preempted in *Statland v. American Airlines, Inc.*, 998 F.2d 539, 541-42 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 603 (1993). The petition is therefore neither one of first impression, nor will it affect anyone other than Johnson and his dispute over a grand total of $3.14. This Court's review is therefore not warranted and the petition should be denied.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. *WOLENS* DOES NOT EXCLUDE ALL CONTRACT CLAIMS FROM PREEMPTION UNDER THE ADA.

Wolens held that section 1305(a)(1) of the ADA does not preempt state "enforcement of contract terms set by the parties themselves," and therefore does not preempt contract claims "seeking recovery *solely* for the airline's alleged breach of its own, *self-imposed undertakings*," *Wolens*, 63 U.S.L.W. at 4069, or for the airline's breach of "a term *the airline itself stipulated*." *Id.* at 4070 (emphasis added). The opinion makes equally clear, however, that section 1305 *does* preempt contract claims "to the extent they seek to effectuate the State's public policies, rather than the intent of the parties." *Id.* at 4070, n.8 (quoting Brief for the United States as *Amicus Curiae* in Support of Reversal at 28, *Wolens* (No. 93-1286)). The Court stressed that "[t]his distinction between what the State dictates and what the airline *itself undertakes* confines courts, in breach of contract actions, to the parties' bargain, with *no* enlargement or enhancement based on state laws or policies *external to the agreement*." *Id.* at 4070 (emphasis added). Thus, section 1305(a)(1) "stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who *claims and proves* that an

airline dishonored a term the airline itself stipulated." *Id.* (emphasis added).[4]

As American will next show, the particular contract claim at issue in this case is plainly preempted under the test established in *Wolens* because Johnson does *not* "claim" or allege that American stipulated, understood or agreed that the federal transportation excise tax would be excluded from the "fare" when calculating the ticket refund surcharge, and because enforcement of his claim will necessarily require "enlargement or enhancement" of the bargain between the parties based on state laws or policies external to the "agreement" they allegedly made.

II. JOHNSON DOES NOT ALLEGE A CONTRACT CLAIM WHICH CAN ESCAPE PREEMPTION UNDER *WOLENS*.

The petition should fail because Johnson *does not even allege* that American stipulated, undertook or agreed to refund that portion of his ticket's price attributable to the federal transportation excise tax. Absent such an allegation, Johnson fails to meet the predicate test under *Wolens, i.e.*, that American breached a "self-imposed" undertaking which American "itself" had specifically agreed to perform. *Wolens*, 63 U.S.L.W. at 4069. Instead, Johnson alleges simply that:

> Plaintiff was then told by an employee of American that a special fare was available to him involving a

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[4] The petitioners in *Wolens* did "claim" that American had violated a self-imposed undertaking. American denied that it had ever made or agreed to the undertaking alleged in *Wolens*, and this Court therefore remanded to the state court for a determination of whether petitioners could "prove" that American had itself undertaken the obligation alleged in that case, without reliance on any state laws or policies external to any agreements American itself undertook to perform. *Id.* at 4071. The Court made clear it was expressing no view on resolution of that question. *Id.* Thus, the "claims" in *Wolens* will be preempted if the plaintiffs in that case fail to prove the existence of the self-imposed undertaking they have alleged.

> purchase deadline and a penalty of 25% of the fare for any changes or cancellations. Plaintiff accepted the offer of that fare, and an oral contract was thereby entered into.

App. at 3a, ¶ 7.

Johnson's complaint does *not* allege that American agreed or undertook to refund all of the federal transportation excise tax. Nor does the complaint allege that American agreed that the term "fare" would not include the federal transportation excise tax for purposes of calculating the service charge for a refund. Because Johnson does not allege an undertaking or a meeting of the minds concerning the meaning of the term "fare," Johnson's alleged oral contract claim cannot be resolved by the State court without enlargement or enhancement of the term "fare" based on State laws or policies external to the terms of the alleged agreement. It is, therefore, preempted under *Wolens* and *Morales* because the claim is an attack on American's method of calculating passenger ticket refunds, and hence on American's "rates," under the ADA.

A state court construing the term "fare" to exclude the federal transportation excise tax in the absence of an allegation that American agreed to that definition necessarily violates this Court's mandate in *Wolens* against imposing state substantive standards or policies with respect to contracts that relate to "rates, routes, or services" of an airline. *Wolens*, 63 U.S.L.W. at 4070. Thus, Johnson's claims are preempted squarely under *Morales* and *Wolens* and the petition should be denied.

III. THE COURT'S DECISION BELOW WAS CORRECTLY DECIDED UNDER *MORALES*.

In *Morales*, 112 S.Ct. at 1041, this Court preempted the States from enacting rules and regulations concerning the same type of claim that Johnson seeks to adjudicate in his breach of contract claim against American. The Air Travel Industry Enforcement Guidelines of the Na-

tional Association of Attorneys General at issue in *Morales*, 112 S.Ct. at 2039, required, *inter alia*, that an advertised airline "fare" include all taxes and surcharges—the precise opposite of the construction Johnson seeks here. This Court held, however, that the ADA preempted the enactment, and necessarily the enforcement, of state guidelines dictating the meaning of the term "fare." *Morales*, 112 S.Ct. at 2041. The court below recognized that there is no difference between the preemption of state guidelines defining the term "fare," as in *Morales*, and the preemption of an equivalent state law guideline defining the term "fare" in a breach of contract action. *Johnson*, 642 N.E.2d at 980. The court below correctly observed that:

> The facts in the instant case present an even more compelling basis for preemption than did the facts addressed by the Court in *Morales*. In *Morales*, the preempted State law claims concerned, among other things, advertising of limitations on refunds. Here, the State law claims attack not merely the advertising limitations on refunds, but the limitations themselves.
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> * * * *
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> The plaintiffs' claims do not require us to address a borderline preemption question. Rather, the State law claims here clearly relate to the rates charged by airlines for reduced fare tickets. Furthermore, to allow plaintiffs to bring these State law claims would create exactly the type of rate inconsistency among States which Congress intended to prohibit by enacting the Federal preemption language of section 1305(a)(1).

Johnson, 633 N.E.2d at 979-80.

In summary, this petition involves a breach of contract claim that is preempted under section 1305(a)(1) of the ADA as construed in both *Morales* and *Wolens*. To resolve Johnson's claim, the State court would necessarily apply substantive State standards, and normative policies to construe the term "fare," an exercise of the judicial

power which this Court has previously preempted as "relating to rates, routes, or services." Moreover, the appellate court's opinion is consistent with *Morales* and *Wolens* and in this instance will not enlarge or otherwise alter the scope of the preemption doctrine as defined in the ADA or construed by this Court. Accordingly, the petition should be denied.

IV. THE DEPARTMENT OF TRANSPORTATION, NOT THE STATES, IS THE APPROPRIATE DECISION MAKER FOR JOHNSON'S CLAIM.

State court adjudication of the term "fare," in the absence of preemption, will also certainly result in multiple and conflicting standards relating to airline rates. For example, some state courts have held in other contexts that "fare" means the charge for the carriage of a passenger. *See e.g., Krause v. Pacific Mut. Life Ins. Co.*, 141 Neb. 844, 5 N.W.2d 229, 232 (1942) (interstate airline flight fare is "the rate of charge for the carriage of passengers, as approved by the proper governmental agency"); *Clark v. Southern Ry. Co.*, 69 Ind. App. 697, 119 N.E. 539, 542 (1918) (railway fare is "the rate of charge for the carriage of passengers . . . money paid for a voyage or passage"); *Philadelphia v. Philadelphia Rapid Transit Co.*, 228 Pa. 325, 77 A. 501, 503-04 (1910) (rapid transit fare is "the price of passage, or the sum paid for carrying a passenger" or "a rate of charge for the carriage of passengers"). There is widespread disagreement, however, concerning what is included in the "fare," especially when the issue is whether taxes are included. *See e.g., State ex rel. Ariz. Dept. of Revenue v. Cochise Airlines*, 128 Ariz. 432, 626 P.2d 596, 600 (1980) (air fare does not include airport head tax); *Simon v. City of New York*, 22 Misc. 2d 718, 197 N.Y.S.2d 288, 292 (N.Y. Sup. Ct. 1960) (taxi cab fare includes transportation tax); *People v. Pansmith*, 14 Misc. 2d 300, 174 N.Y.S.2d 860, 862 (N.Y. Crim. Ct. 1958) (railway fare does not include federal tax); *Santa Fe Trail Transp. Co. v. Newlon*, 195

Okla. 542, 159 P.2d 713, 714 (1945) (bus fare includes transportation tax). These state court opinions, adopting inconsistent definitions of the term "fare," illustrate precisely why a uniform federal definition of "fare" is required for the airline industry, and why this area must be federally preempted.

Leaving the definition of a "fare" to the State court is also inappropriate because DOT regulations already govern the use of the term when used by airlines in communicating with the public. Specifically, DOT's price advertising regulation provides:

> The Board considers any advertising or solicitation by a . . . carrier, or agent of [a carrier], for passenger air transportation, . . . that states a price for such air transportation, . . . to be an unfair or deceptive practice, *unless* the price stated is the *entire price* to be paid by the customer to the [carrier] . . . .

14 C.F.R. § 399.84 (1994) (emphasis added).

DOT regulations therefore require that the term "fare" *include* the federal transportation excise tax. During a House of Representatives hearing, Patrick V. Murphy, the Deputy Assistant Secretary for Policy and International Affairs of DOT, made clear DOT's intent in this regard when he testified as follows:

> First of all, *I want to point out that the 10 percent ticket tax is included in all of the fares that you see.* Whenever you see fares advertised in the media, that will include the 10 percent ticket tax. The issue here is the per passenger add-ons. Airport fees, passenger facility charges, and inspection fees at international borders are the add-ons that are usually at the bottom of the page. *So the biggest bulk, that 10 percent, is in the fare.*
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> * * * *
>
> [Advertisements must] list the fare correctly and accurately. *Included in that fare is the 10 percent ticket tax.* Those are the fares you typically see advertised.

> *If you see a $99 fare, that is with the 10 percent Federal ticket tax included,* and that has to be an accurate fare. We also require that they note in the ad any other fees that might be applicable.

Hearing on the Airline Advertising Reform Act of 1992: Hearing on H.R. 5124 before the Subcomm. on Aviation of the House Comm. on Public Works and Transp., 102d Cong., 2d Sess. 22-36 (1992) (emphasis added).

Section 399.84 and DOT's expressed intent that the term "fare" include the federal transportation excise tax not only confirm American's position in the court below, they demonstrate that DOT, not the States, should determine what is a "fare" for purposes of an airline refund policy applied to discount fares. The airlines must not be left to deal with a balkanized patchwork of state court interpretations of the term "fare," particularly if the definitions adopted are inconsistent with DOT regulations which are binding on American under section 411 of the Federal Aviation Act, 49 U.S.C. App. § 1381. This is exactly the type of state regulation and enforcement this Court held preempted in *Morales* and *Wolens*.

The opinion and judgment below were therefore consistent with *Morales* and *Wolens* and this petition does not present new substantive questions which merit review by this Court. The petition should therefore be denied.

V. THIS CASE IS NOT OTHERWISE IMPORTANT ENOUGH TO WARRANT REVIEW BY THIS COURT.

A. This Court Recently Denied Certiorari Review Of The Same Question In *Statland*.

The question presented by this petition is not one of first impression, nor is it otherwise distinctive. This Court recently denied certiorari in a virtually identical case. *Statland v. American Airlines, Inc.*, 998 F.2d 539 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 603 (1993). In *Statland*, 998 F.2d at 539, the plaintiff purchased an

American "reduced fare ticket" subject to a 10 percent service charge for any refund. When the plaintiff refunded her ticket, American assessed the 10 percent service charge against the "fare," *i.e.*, the base price for air transportation plus the corresponding federal tax. *Id.* Statland sued American in federal court on her own behalf and on behalf of a putative class to recover the $1.25 federal transportation tax she claimed was not a part of the "fare." *Id.* Statland also sued for conversion, breach of contract, breach of fiduciary duty, and violation of the Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS 505/1 *et seq.*, as well as an implied private cause of action under the Federal Aviation Act. *Statland*, 998 F.2d at 541-42. The Seventh Circuit Court of Appeals affirmed the federal district court's dismissal for lack of subject matter jurisdiction and held that Statland's state law claims were preempted under section 1305(a)(1). *Id.* This Court denied Statland's petition for writ of certiorari. *Statland*, 114 S.Ct. 603 (1993). As in *Statland*, the issue presented here does not merit review by this Court and the petition should be denied.

B. A Minuscule Dollar Amount Is In Controversy.

Johnson seeks recovery of $3.14. The minuscule amount in issue will *not* grow because Johnson cannot prove each element necessary for certification of his putative class. For example, commonality of claims, if any, is absent. 735 ILCS 5/2-801(2) (1993). *See Rice v. Snarlin, Inc.*, 131 Ill. App. 2d 434, 266 N.E.2d 183 (3d Dist. 1970) (class denied certification where contract claims of individual members were based upon oral solicitations which therefore raised unique factual inquiry). *See also McMerty v. Burtness*, 72 F.R.D. 450, 456 (D. Minn. 1976) (putative class denied certification where contract claims of individual class members were based upon oral negotiations).

For example, even assuming Johnson could establish that each member of the class actually spoke with Amer-

ican before purchasing a reduced-fare ticket, Johnson will still be required to present facts sufficient to state a claim including but not limited to: (1) whether individual conversations were with American or one of the many independent travel agencies authorized to sell reduced fare tickets; (2) the substance of each conversation (*e.g.*, whether the class member was told that there was a service charge for refunds equal to "25% of the fare" as alleged by Johnson and whether the class member was told that the "fare" excluded the federal transportation excise tax); (3) whether the circumstances surrounding each individual conversation were sufficient to establish the existence of the alleged oral contract; (4) whether, under the circumstances, "fare" means the purchase price of the ticket or the purchase price of the ticket less the federal transportation excise tax; and (5) whether the class member relied in whole, or in part, on representations advertised in the written media.

Under Illinois law, each of these questions presents a unique question of fact on which plaintiffs normally bear the burden of proof. *Ceres Ill., Inc. v. Illinois Scrap Processing, Inc.*, 114 Ill. 2d 133, 141-47, 500 N.E.2d 1, 4-7 (1986). Because the evidence necessary to prove breach of the alleged oral contract is necessarily unique to each putative class member, no class has been or will be certified. Accordingly, the petition is of no importance except to Johnson and even to him the dispute is of marginal significance.

C. Johnson's "Road to Ruin" Theories Lack Merit.

Johnson's self-serving, exaggerated and purely speculative claims concerning the consequences for contract and personal injury claimants that allegedly flow from the appellate court's decision are without merit. First, Johnson's claim that the Illinois appellate court "effectively" preempted *all* ticket contract claims is, quite simply, not the case. Johnson's similar claim that "there will be no free market for airline tickets if airlines and passengers

cannot rely on their contracts" is likewise a gross overstatement and is unfounded. Pet. at 5. Second, this petition does *not* involve questions concerning preemption of state law claims in tort under the ADA. In *Wolens*, American did not assert, nor does it assert here, that the ADA preempts personal injury claims relating to airline operations. *Wolens*, 63 U.S.L.W. at 4070, n.7. We also note that none of the dire consequences Johnson predicts have become reality after this Court denied certiorari on nearly identical claims in *Statland*, 114 S.Ct. 603 (1993).

CONCLUSION

For all the reasons set forth above, this Court should deny the petition for writ of certiorari of Arthur Johnson.

Respectfully submitted,

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Chicago, IL 60601
(312) 616-1800
Counsel for Respondent

* Counsel of Record

APPENDIX

3. At all times material to this action there was in effect a statute, 26 U.S.C. Section 4261, which provides in relevant part:

> (a) There is hereby imposed upon the amount paid for taxable transportation (as defined in section 4262) of any person a tax equal to 8 percent of the amount so paid.
>
> * * * *
>
> (b) . . . the taxes imposed by this section shall be paid by the person making the payment subject to the tax.

4. At all times material to this action there was in effect a statute, 26 U.S.C. Section 4262, which provides in relevant part:

> (a) . . . the term "taxable transportation" means—
>
> (1) transportation by air which begins in the United States or in the 225-mile zone and ends in the United States or in the 225-mile zone; and
>
> (2) in the case of transportation by air other than transportation described in paragraph (1), that portion of such transportation which is directly or indirectly from one port or station in the United States to another port or station in the United States, but only if such portion is not a part of uninterrupted international air transportation . . .

5. At sometime more than 30 days prior to July 8, 1985, the specific date of which is presently unknown, Plaintiff called directly to American Airlines in Chicago to make an inquiry concerning travel to New York on or about July 8, 1985. At various times prior to that call Plaintiff had seen and heard American advertisements describing low fare restricted ticket options.

6. On the occasion of the designated call the Plaintiff asked for the lowest fare and asked for any restrictions on the fare.

7. Plaintiff was then told by an employee of American that a special fare was available to him involving a purchase deadline and a penalty of 25% of the fare for any changes or cancellations. Plaintiff accepted the offer of that fare, and an oral contract was thereby entered into.

8. Defendant then mailed to the Plaintiff a ticket for travel from Chicago to New York-LaGuardia on July 8, 1985. The fare classification was QE30. The Plaintiff was charged and paid through his American Express credit card the sum of $146.30 as a fare for air transportation plus the sum of $11.70 for air transportation tax. Attached hereto as an exhibit is a copy of Plaintiff's ticket coupon.

9. The ticket which was purchased by the Plaintiff was subject to a condition that a penalty or service charge of 25% of the fare was chargeable for cancellation or alteration.

10. The Plaintiff did not travel to New York as scheduled. The Plaintiff, prior to July 8, 1985, called directly to the Defendant and cancelled his reservation.

11. On or about August 6, 1985, Plaintiff caused to be returned Plaintiff's original ticket coupons by delivering them to an American ticket office in Chicago, Illinois. A credit card refund receipt was issued to the Plaintiff's American Express account, a copy of which is attached hereto as an exhibit. In calculating the refund, an employee of the Defendant charged $39.50 as a penalty and issued a refund or credit of $118.50. In calculating the designated penalty the Defendant improperly and in breach of the contractual agreement between the parties charged a penalty not only on the fare but also on the tax.

12. Plaintiff brings this action individually and pursuant to Chapter 110, Section 2-801, Illinois Revised Statutes, as representative party on behalf of all persons or entities who purchased tickets for air transportation subject to the designated tax and subject to the penalty or service charge condition and who were assessed or paid a penalty or service charge in excess of 25% of the fare.

13. The requirements for maintenance of a class action are met in that:

a. The members of the class are so numerous, upon information and belief numbering in the hundreds of thousands, that joinder of all members of the class in this action is impracticable;

b. There are questions of fact or law concerning the imposition of the excess charges which are common to the class and which plainly predominate over any questions concerning only individual class members;

c. The representative party will fairly and adequately protect the interest of the class, the Plaintiff's claims being typical and the Plaintiff's attorneys being knowledgeable and experienced in prosecuting class actions;

d. The class action is an appropriate method for the fair and efficient adjudication of the controversy, the claims being numerous, small and similar.

14. The Plaintiff and members of the class are entitled to a refund of the wrongful excess penalty or service charges assessed or paid.

WHEREFORE, Plaintiff prays for relief as follows:

A. for an order determining that this case may be maintained as a class action.

B. for an order compelling the Defendant to account for all sums of money retained by Defendant which were in excess of the penalties or service charges which Defendant was entitled to charge or assess.

C. for judgment in favor of the Plaintiff and members of the class for the excess sums disclosed by the accounting.

D. for an order formulating an orderly plan of distribution.

E. for an award of reasonable attorneys fees for counsel for the plaintiff class.

F. for costs and such other relief as may be necessary and appropriate.

COUNT II

1. Plaintiff is a resident of Cook County, Illinois.

2. Defendant is a foreign corporation registered to do business in Illinois with its principal place of business in Illinois in Cook County, Illinois.

3. At all times material to this action there was in effect a statute, 26 U.S.C. Section 4261, which provides in relevant part:

> (a) There is hereby imposed upon the amount paid for taxable transportation (as defined in section 4262) of any person a tax equal to 8 percent of the amount so paid.
>
> * * * *
>
> (b) . . . the taxes imposed by this section shall be paid by the person making the payment subject to the tax.

4. At all times material to this action there was in effect a statute, 26 U.S.C. Section 4262, which provides in relevant part:

> (a) . . . the term "taxable transportation" means—
>
> (1) transportation by air which begins in the United States or in the 225-mile zone and ends in the United States or in the 225-mile zone; and
>
> (2) in the case of transportation by air other than transportation described in paragraph (1), that

> portion of such transportation which is directly or indirectly from one port or station in the United States to another port or station in the United States, but only if such portion is not a part of uninterrupted international air transportation . . .

5. At sometime more than 30 days prior to July 8, 1985, the specific date of which is presently unknown, Plaintiff called directly to American Airlines in Chicago to make an inquiry concerning travel to New York on or about July 8, 1985. At various times prior to that call Plaintiff had seen and heard American advertisements describing low fare restricted ticket options.

6. On the occasion of the designated call the Plaintiff asked for the lowest fare and asked for any restrictions on the fare.

7. Plaintiff was then told by an employee of American that a special fare was available to him involving a purchase deadline and a penalty of 25% of the fare for any changes or cancellations. Plaintiff accepted the offer of that fare and an oral contract was thereby entered into.

8. Defendant then mailed to the Plaintiff a ticket for travel from Chicago to New York-LaGuardia on July 8, 1985. The fare classification was QE30. The Plaintiff was charged and paid through his American Express credit card the sum of $146.30 as a fare for air transportation plus the sum of $11.70 for air transportation tax. Attached hereto as an exhibit is a copy of Plaintiff's ticket coupon.

9. The ticket which was purchased by the Plaintiff was subject to a condition that a penalty or service charge of 25% of the fare was chargeable for cancellation or alteration.

10. The Plaintiff did not travel to New York as scheduled. The Plaintiff, prior to July 8, 1985, called directly to the Defendant and cancelled his reservation.

11. On or about August 6, 1985, Plaintiff caused to be returned Plaintiff's original ticket coupons by delivering them to an American ticket office in Chicago, Illinois. A credit card refund receipt was issued to the Plaintiff's American Express account, a copy of which is attached hereto as an exhibit. In calculating the refund, an employee of the Defendant charged $39.50 as a penalty and issued a refund or credit of $118.50. In calculating the designated penalty the Defendant retained 25% of the transportation tax collected.

12. Taxes are collected by Defendant in a fiduciary capacity, and their refund can never constitute a loss of revenue.

13. The retention of taxes as part of a fare penalty is wholly unrelated to any damages which would reasonably result from Plaintiff's failure to fly.

14. The inclusion of taxes in the calculation of a penalty or service charge by Defendant was intended to penalize Plaintiff for not flying or altering his ticket or to deter Plaintiff from not flying or alter his ticket.

15. As a consequence of the facts alleged in paragraphs #12, 13, and #14, the inclusion of taxes collected in the penalty charged to the Plaintiff is a forfeiture or a penalty which is unforceable at law.

16. Plaintiff brings this action individually and pursuant to Chapter 110, Section 2-801, Illinois Revised Statutes, as representative party on behalf of all persons or entities who purchased tickets for air transportation subject to the designated tax and subject to the penalty or service charge condition and who were assessed or paid a penalty or service charge which was calculated in a manner so as to include a part or all of the federal transportation taxes collected.

17. The requirements for maintenance of a class action are met in that:

a. The members of the class are so numerous, upon information and belief numbering in the hundreds of thousands, that joinder of all members of the class in this action is impracticable;

b. There are questions of fact or law concerning the imposition of the excess charges which are common to the class and which plainly predominate over any questions concerning only individual class members;

c. The representative party will fairly and adequately protect the interest of the class, the Plaintiff's claims being typical and the Plaintiff's attorneys being knowledgeable and experienced in prosecuting class actions;

d. The class action is an appropriate method for the fair and efficient adjudication of the controversy, the claims being numerous, small and similar.

18. The Plaintiff and members of the class are entitled to a refund of any federal transportation taxes retained as part of a percentage penalty or service charge.

WHEREFORE, Plaintiff prays for relief as follows:

A. for an order determining that this case may be maintained as a class action.

B. for an order compelling the Defendant to account for all sums of money which were federal transportation taxes retained as part of a percentage penalty or service charge.

C. for judgment in favor of the Plaintiff and members of the class for the sums disclosed by the accounting.

D. for an order formulating an orderly plan of distribution.

E. for an award of reasonable attorneys fees for counsel for the plaintiff class.

F. for costs and such other relief as may be necessary and appropriate.

BLOCK, LEVY & ASSOCIATES

By Russell C. Green

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